

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, DC 20540

ORIGINAL

In the Matter of)
)
)

Digital Performance Right in Sound)
Recordings and Ephemeral Recordings)
)

Docket No. 2005-1 CRB DTRA

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JOINT PROPOSED REPLY FINDINGS of IBS and WHRB

Copyright Royalty Board

I. The Rates and Reporting Must Reflect the Diversity of Non-commercial Webcasting.

A disproportionately large amount of confusion, compared to the relatively small amount of revenue SoundEx might reasonably expect to extract from the non-commercial sector, surrounds the determination of the proper rate or rates for non-commercial webcasters. Chief Judge Sledge's early perception, or at least premonition, of this disparity was reflected in the colloquy between him and Capt. Kass where, at the conclusion of Capt. Kass' testimony, he asked Capt. Kass "why it's appropriate for a government agency ... to be spending time dealing with clubs of students who may have five people listening to them...." WORD Tr (8/7/06) at 61-65.

There is a wide continuum of non-commercial webcasters, ranging from the large non-commercial webcasters described in ¶¶ 1122 - 23 of SoundEx's proposed findings under Point IX(E) with hundreds of thousands of listeners per month to the college webcasters with an average of five, Kass WORD Tr (8/7/06) at 21, 37, or twelve, Papish WORD Tr (8/7/06) at 95, 157-58, or <3, Willer WORD Tr (8/2/06) at 290, 285-86, simultaneous listeners, and those

averages including listeners to broadcasts of varsity athletic events involving no digital music at all. Willer WORD Tr (8/2/06) at 333. In fact, there is wide diversity among even non-commercial, educationally affiliated webcasters.* / Kass written testimony at ¶¶ 7, 9, WORD Tr (8/7/06) 16-19; Willer WORD Tr (8/7/06) at 278 (“wide variety”), 333 (“great variation”). As to the great “advertising” revenues depicted by SoundEx for the large non-commercial webcasters, SoundEx prop. fdgs. ¶¶ 1110-12, 1134ff., the situation for the non-commercial, educationally affiliated webcasters is again quite different. CBI’s proposed findings note that “unlicensed Noncommercial Educational Stations also struggle to obtain ongoing advertising or underwriting of any consequence due to their limited signal and audience.” Op. cit. at ¶ 13.

SoundEx in paragraphs 1187-91 would make WHRB out to be a poster child for advertising revenues on the non-commercial educationally affiliated webcasters, implying that these revenues come from exploitation of musical artists. Of course, the record shows a quite different picture. As numerous witnesses, including one offered by SoundEx, have pointed out in their testimony, the less-popular artists see the non-commercials as their hope for public exposure of their music at that stage of their careers. IBS-WHRB joint prop. fdgs, ¶¶ 26-27. In paragraphs 1187-91 SoundEx does not trace any of these advertising dollars to the webcasting of digitally recorded music, for “the major source of advertising revenue is, again, sports or other broadcasts, such as commencement, things associated with Harvard University....” Papish, WORD Tr (8/7/06) at 114. As to the source of advertising dollars, “many of the advertisers in the local Boston-Cambridge area are folks that market ... products to the Harvard

* / The *non-commercial, educationally affiliated webcasters* may be conveniently described as non-commercial webcasting operations within the meaning of Section 114(f)(5)(E)(i), operated for educational purposes at or in conjunction with a domestic institution of secondary and higher education, and staffed in substantial part by students affiliated with such institution.

community. And this tends to be the type of program that has the largest number of Harvard-based listeners.” *Id.* at 114-15. In short, an appropriate characterization of these particular SoundEx proposed findings will be found in Gilbert & Sullivan’s “H.M.S. Pinafore.”

The Board cannot reasonably conflate the operations of the commercial webcasters with those of the non-commercial webcasters. If anything is clear in this record it is that the commercial webcasters, educationally affiliated webcasters are different “types” than the non-commercial, educationally affiliated webcasters. They act differently, and they use music differently. That is, the commercial webcasters are profit-driven; the non-commercial, educationally affiliated webcasters are mission-oriented. IBS-WHRB joint prop. fdgs. ¶ 4. The commercial webcasters typically program their computers to play a limited playlist intensely; the non-commercially, educationally affiliated webcasters typically play a much more eclectic mix of music, often not from a playlist but “on the fly.” IBS-WHRB joint prop. fdgs. ¶ 12. The commercial webcasters are not focused on educating the public or volunteer staffs; the non-commercial, educationally affiliated webcasters are.

Most of the characterizations of the non-commercial, educationally affiliated webcasters in SoundEx’s proposed findings are over-simplified to such an extent that the Board would be justified in disregarding them. When all is said and done, the core and undisputed facts remain that audiences for the non-commercial, educationally affiliated webcasters are small, very small, typically in the 2.94 - 20 range,¹ *ante* at 1. IBS-WHRB joint prop. fdgs., ¶ 22. Just this fact alone should drive the Board to three conclusions with respect to the non-commercial, educationally affiliated webcasters:

¹ These average figures for instantaneous connections materially overstate the relevant webcasting audiences they represent, i.e., they include more popular webcasts of non-licensable music and they are so small as to be materially distorted by measurement anomalies, such as those testified to by Prof. Willer, WORD Tr (8/2/06) at 289, 291-93, 335.

- I. SoundEx's fears about cannibalization of the webcasting audience or webcasting advertising dollars are purely theoretical, if not hypothetical. In numbers it hasn't happened so far, and SoundEx has offered no evidence that it would be larger in the future. More specifically, SoundEx has offered no evidence that mainstream webcasting audiences would be diverted in the future by the eclectic music that is typically the mainstay of non-commercial, educationally affiliated webcasters.
- II. The non-commercial, educationally affiliated webcasters typically do not use digitally recorded music as their principal market-product but only as a partial means of carrying out their educational missions.
- III. The recordkeeping and reporting requirements urged upon the Board here -- despite the Board's order of September 10, 2006 --, are totally inappropriate for these webcasters, because the burdens on limited budgets and volunteer staffs are simply disproportionate to the potential revenue yield. In short they are not cost-effective, and they would be at war with the efficiency criteria that Ms. Kessler testified to.

There are obviously other, less-central considerations and controverted fact issues in play, but their disposition is driven by the same relative commercial--non-commercial audience disparity.

II. The Challenge to the Board and a Possible Resolution Suggested by the Record

The two-part challenge that the Board faces as to the non-commercial webcasters under Section 114(f)(2)(B) of the statute, is (i) devising a series of category "types" that in the aggregate encompass all non-commercial webcasters and then (ii) prescribing rates for each that reflect that submarket, exhibiting a proportionality or rightness-of-fit among the continuum of categories.

What IBS and WHRB attempt to do in the instant reply findings is (i) to suggest such a comprehensive categorization of the diverse components of the non-commercial universe and (ii) to suggest a scheme of levels of rates and terms for each category, scaled to the dominant characteristics in the resulting categories. This analysis is intended to be driven by an appraisal of the central commonalty in the record, including the proposed findings of the parties and is

different from IBS and WHRB's joint proposal² and from the ordering paragraph suggested in the two parties' proposed findings.³

SoundEx recognizes the possibility that the Board might treat the small non-commercial, educationally affiliated webcasters differently from the commercial and the big non-commercial webcasters based on 14,600 ATH per month per entity. Brynjolffson rebuttal testimony at 41; SoundEx prop. concl. at ¶¶ 65-67. Of course, the ATH must fairly be "normalized" for proportion of licensable music played. Building on that recognition, IBS and WHRB suggest that the record would support the following scaling of rates -- higher rate in case of overlap:

1. NPR-CPB negotiated rate for other non-commercials with over 146,000 normalized ATH per entity per month (> two hundred average monthly listeners [ACL]) on the average and more than five fulltime employees per entity per year on the average.
2. Larger small non-commercial webcasters under 146,000 normalized ATH per entity per month on the average (< two hundred average monthly listeners [ACL]) or with at least two fulltime employees: \$ 250 annually.
3. Medium small non-commercial webcasters under 14,600 normalized ATH per entity per month (< twenty average monthly listeners [ACL]), with less than two fulltime employees, at institutions with enrollments in excess of 10,000 FT students: \$ 100 annually.
4. Small non-commercial webcasters, e.g., schools (grades K-12), colleges, under 14,600 normalized ATH per month (< twenty average monthly listeners [ACL]), with not more than two fulltime employees: \$ 25 annually.

The minimum fees of \$ 25 per year for the small non-commercial, educationally affiliated webcasters and the \$ 500 per year for the commercial webcasters would be roughly proportionate to the value of digitally recorded music to them.

² That is contained in IBS and WHRB's Clarification of Common Rate Proposal, filed August 10, 2006, a copy of which is appended hereto. SoundEx's complaint, prop. fdg. ¶¶ 1485-87, that this proposal is not explained on the record, ignores Capt. Kass' testimony, WORD Tr (8/7/06) at 36 and SoundEx's own cross-examination of Mr. Papish in WORD Tr (8/7/06) at 129-37; see also 8/7/06 tr at 164-67.

³ For the convenience of the Board the last pages of IBS and WHRB's joint proposed findings, filed December 12, 2006, are also appended hereto for the convenience of the Board.

Recordkeeping and reporting requirements would be imposed only on those noncommercial webcasters paying \geq \$ 250 per annum. They by definition would have more than two fulltime employees to do the recordkeeping and reporting; and, at SoundEx's option, the annual payments from the smaller non-commercial webcasters could be allocated on the basis of plays by the larger non-commercial webcasters. Because reporting and allocation of the smaller amounts is not cost-effective, the omitting of reporting requirements for the smaller webcasters would maximize returns to the artists, i.e., all the money wouldn't be eaten up by processing costs.


CONCLUSIONS

Any rate schedule adopted by the Board should take into account the dominant facts that the non-commercial, educationally affiliated webcasters are materially *smaller* than commercial webcasters and they use different music differently for educational purposes, and their cannibalization ability has been demonstrated to be *de minimis*.

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

HARVARD RADIO BROADCASTING CO., INC.

by 
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December 15, 2006

Appendices: A - IBS and WHRB's Common Rate Proposal,
filed August 10, 2006
B - Ordering paragraph from IBS and WHRB's
Proposed Findings, filed December 12, 2006

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Certificate of Service

I hereby certify that I have caused to be dispatched by e-mail and overnight delivery copies of the foregoing Joint Proposed Reply Findings of IBS and WHRB (FM) to the following persons:

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Washington, D.C.
December 15, 2006
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Digital Performance Right in Sound
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CLARIFICATION OF COMMON RATE PROPOSAL
of Intercollegiate Broadcasting System
and Harvard Radio Broadcasting Co., Inc.

Pursuant to the procedural rules governing this hearing, the questions from the bench to witnesses, and the colloquy between counsel and the bench at the conclusion of the Board's hearing direct testimony on August 7th, Intercollegiate Broadcasting System (IBS) and Harvard Radio Broadcasting Co., Inc. (WHRB), file this modification of their common proposal as to rates and terms in light of the evidence adduced into the record to date.

This proposal is intended to be complementary to the proposal of National Public Radio, as reflected in the written testimony of Kenneth P. Stern, dated October 31, 2005, the proposals thereby encompassing between them the entire universe of non-commercial webcasters, as defined in Section 114(f)(5)(E)(i) of the Copyright Act, as amended, 17 U.S.C. § 114(f)(5)(E)(i).

Webcasts by non-commercial educational broadcast stations qualified to receive funding under Section 201(9) of the Public Broadcasting Act of 1967, as amended, 47 U.S.C. § 396, shall be covered by the annual lump-sum payment proposed by NPR and CPB.

Large non-commercial webcasters, i.e., those with five or more fulltime employees during the calendar year and also those affiliated with educational institutions having not less than ten thousand fulltime students domestically, shall annually make an advance lump-sum payment of \$ 100.

The remaining Small non-commercial webcasters shall annually make an advance lump-sum payment of \$ 25.

The receiving agent(s) may require annually reasonable, proportionate, and economic reporting of usage by members of each class of webcasters, not to exceed BMI's current requirement under Section 118 of a seventy-two-hour playlist in handwritten form.

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August 10, 2006

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Matthew K. Schettenhelm

Washington, D.C.
August 11, 2006

CONCLUSIONS

- I. The Board should set a separate rate for that segment of the webcasting rights market in which the non-commercial, educationally affiliated webcasters operate.
- II. The non-commercial, educationally affiliated webcasters operate in, and program to, an effectively separate and independent segment of the webcasting market.
- III. In enacting Section 114(f)(2) of the Act, Congress intended that the accepted theory of pricing, including market segmentation, be applied, and its application to the submarket for distinctive programming by non-commercial, educationally affiliated webcasters is compelling.
- IV. The FMV of the non-commercial, educationally affiliated webcasters' performance of digital recordings in their segment of the webcasting market is determined by the FMV of such rights in that market segment.
- V. SoundEx has offered no evidence that theoretical cannibalization or diversion of other submarkets' audience or revenues has occurred under present conditions in the 2002-05 period under existing rates or would occur in the 2006-10 timeframe if the rates jointly proposed by IBS and WHRB were adopted by the Board.
- VI. In setting the effective rates and terms for the non-commercial, educationally affiliated webcasters, the rates and terms should reflect an allowance for the promotional benefits to the artist and for the costs of recordkeeping and reporting imposed by or at the behest of the licensor, SoundEx.

ORDERING PARAGRAPH

Accordingly, the Board adopts for the non-commercial, educationally affiliated webcasters*/ the following rates:

Webcasts by non-commercial educational broadcast stations qualified to receive funding under Section 201(9) of the Public Broadcasting Act of 1967, as amended, 47 U.S.C. § 396, shall be covered by the annual lump-sum payment proposed by NPR and CPB.

Large non-commercial webcasters, i.e., those with five or more fulltime employees during the calendar year and also those affiliated with educational institutions having not less than ten thousand fulltime students domestically, shall annually make an advance lump-sum payment of \$ 100.

The remaining Small non-commercial webcasters shall annually make an advance lump-sum payment of \$ 25.

*/ The *non-commercial, educationally affiliated webcasters* may be conveniently described as non-commercial webcasting operations within the meaning of Section 114(f)(5)(E)(i), operated for educational purposes with fewer than five fulltime paid employees.

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